

1       your ruling is that if the Bureau decides to present  
2       Mr. Maia's rebuttal testimony, then I'll be entitled to  
3       cross examine him on that testimony?

4               JUDGE CHACHKIN: It seems to me that probably  
5       would be the result, yes. Then the question would be  
6       whether I would require Mr. Maia to come here or  
7       whether or not we could do it by speakerphone.

8               MR. MALINEN: Your Honor, does this mean  
9       that, in fact, he is not adverse or that he is adverse  
10      because if --

11              JUDGE CHACHKIN: No. What I'm saying is  
12      that, obviously, if Mr. Lyon decides to call him as an  
13      adverse witness, then you won't have to present him  
14      yourself. You'll be able to cross examine him like you  
15      would any other adverse witness, and you could go into  
16      these matters with him or any other matters that were  
17      raised by Mr. Lyon on his direct examination.

18              But I'm saying if Mr. Lyon decides not to  
19      call him as a witness and you want, for some reason, to  
20      put in this rebuttal testimony of his, then you would  
21      have the obligation to make him available for cross  
22      examination. That would involve a credibility matter,  
23      it seems to me.

24              MR. MALINEN: Yes, Your Honor. We are  
25      concerned about the idea that, as you mentioned, we

1 will later be discussing speakerphone options and all  
2 the rest. If this were simply a matter of our putting  
3 our direct case-in-chief, none of Mr. Lyon's theories,  
4 we could perhaps do that in some less formal fashion  
5 and not incur the cost to bring Mr. Maia out here.

6 If he must be brought out here because of  
7 credibility issues entirely brought on by Mr. Lyon's  
8 responsive case, he ought to pay for Mr. Maia to come  
9 out here if the speakerphone is otherwise an option.  
10 He ought to be his adverse witness because these  
11 authenticating matters don't get into any of these  
12 other lines of inquiry.

13 JUDGE CHACHKIN: Well, you're missing the  
14 point. I'm saying I am not going to require -- at  
15 least up to now, Mr. Lyon has not presented a reason to  
16 cross examine Mr. Maia on the direct evidence that he  
17 is intending to adduce; namely, authenticate certain  
18 documents.

19 What I'm saying is that if you decide later  
20 on to increase the role of Mr. Maia by putting in this  
21 rebuttal evidence, then we have a different situation.

22 Right now, his direct case, all it does is  
23 authenticate documents.

24 MR. MALINEN: Right now, as of today, no  
25 right of cross exam?

1 JUDGE CHACHKIN: Unless Mr. Lyon can  
2 demonstrate to me what there is about these documents  
3 he's authenticating that he wants to cross examine him  
4 on.

5 MR. LYON: Your Honor, may I just respond a  
6 second to what Mr. Malinen suggested because I think  
7 it's an outrageous suggestion.

8 JUDGE CHACHKIN: Let's avoid terms as  
9 outrageous. Let's conduct ourselves in a more quiet  
10 fashion if possible. I think it would be better for  
11 the hearing.

12 MR. LYON: I'm sorry, Your Honor.  
13 Mr. Malinen suggested that if I join an issue in  
14 response to his direct case, that I should be required  
15 to pay for Mr. Malinen's witness to come here to refute  
16 my case. Your Honor, if that's the case, then he  
17 should be required to pay for all of my witnesses that  
18 I'm going to bring here to refute his case.

19 JUDGE CHACHKIN: I think you misunderstood  
20 what he said. At least, you misunderstood what I said.  
21 I said I'm only ruling that Mr. Maia does not have to  
22 be here for the purpose of authenticating these  
23 documents in the direct case unless you can demonstrate  
24 to me that, somehow, some credibility issue exists with  
25 respect to his authenticating documents.

1 MR. LYON: That I understood, Your Honor, and  
2 that I can accept.

3 JUDGE CHACHKIN: If the Bureau wishes, at the  
4 end of your case, Respondent's case, to put on Mr. Maia  
5 for a different purpose which does involve credibility,  
6 then it will be up to the Bureau to present him as a  
7 witness, and I'll have to decide whether to do it by  
8 speakerphone or require him to appear in person.

9 And also the option is, if you want to  
10 present Mr. Maia as your own witness, as a hostile  
11 witness, then under those circumstances, the Bureau  
12 would have a right to cross examine Mr. Maia as to all  
13 matters that you raise and also attempt to rehabilitate  
14 him if it can by introducing material, just dealing  
15 with the material raised in his rebuttal case.

16 Is that clear what I'm saying?

17 MR. LYON: That is very clear, Your Honor. I  
18 will put the Bureau on notice that I can barely afford  
19 to bring my own clients out here. So, I don't believe  
20 that I can afford to bring Mr. Maia out here to testify  
21 as an adverse witness.

22 JUDGE CHACHKIN: Well, if that's the case,  
23 then the rebuttal statement of Mr. Maia won't come in  
24 unless the Bureau is prepared to make him available as  
25 a witness.

1                   MR. FITZGIBBON: I would like to state right  
2 up front that the Bureau is willing to agree to cross  
3 examination by Speakerphone of all out-of-town  
4 witnesses except for the three principals, Christine  
5 McElwaine, Charles Pascal and Sandra Crane.

6                   JUDGE CHACHKIN: Mr. Lyon, are you agreeable  
7 to that?

8                   MR. LYON: I'm agreeable to the speakerphone  
9 cross examination of Tom Fakehany.

10                  JUDGE CHACHKIN: How do you spell that?

11                  MR. LYON: I was afraid you were going to say  
12 that, Your Honor. Bear with me for a second. I will  
13 find the spelling.

14                  Your Honor, it is actually Thomas E.  
15 Fakehany, F-A-K-E-H-A-N-Y, I believe. He was one of  
16 the volunteer examiners. I believe he was the contact  
17 volunteer examiner for the August 24, 1991, and  
18 September 14, 1991, test sessions.

19                  JUDGE CHACHKIN: Let's deal with the next  
20 individual you want. You want a Mr. Morse for cross  
21 examination.

22                  MR. LYON: That's correct, Your Honor, and,  
23 again, Mr. Morse is in response to his rebuttal  
24 testimony that the Bureau proffered on Monday.

25                  JUDGE CHACHKIN: Well, let's, first of all,

1 deal with the direct case here.

2 MR. LYON: I did not ask for Mr. Morse.

3 JUDGE CHACHKIN: Mr. Morse is not one of the  
4 witnesses.

5 MR. FITZGIBBON: You did notice him as an  
6 adverse witness, and you listed many topics that you  
7 wanted to examine him on.

8 MR. LYON: That's correct.

9 MR. FITZGIBBON: And since he's already been  
10 noticed as an adverse witness to these very broad areas  
11 of examination, one small part of which is the same  
12 matter that his rebuttal affidavit is on, I think that,  
13 again, what the Respondents really want to do is call  
14 David Morse as an adverse witness.

15 JUDGE CHACHKIN: Well, I don't know what the  
16 Respondents want to do. There again, we're dealing  
17 with the rebuttal case of the Bureau. We're not  
18 dealing with the direct case.

19 Apparently, Mr. Morse isn't being called as a  
20 direct witness by the Bureau.

21 MR. LYON: He appears on many documents that  
22 the Bureau wants to have admitted, but they have not  
23 seen fit to use him as a witness to authenticate those  
24 documents, which will be a basis for my objections.

25 MR. FITZGIBBON: But the Respondents have

1 indicated that they intend to call Mr. Morse as an  
2 adverse witness in their responsive case.

3 MR. LYON: That is my intent now, Your Honor,  
4 if I can find the funds to bring him here.

5 JUDGE CHACHKIN: You don't want to present  
6 him through speakerphone, I assume?

7 MR. LYON: Your Honor, since I believe this  
8 witness will not tell the truth a substantial amount of  
9 the time, I think I need to have him in front of you if  
10 I present him.

11 JUDGE CHACHKIN: Well, again, all I can say  
12 is, as far as -- with respect to the Bureau's rebuttal  
13 case, assuming that Mr. Morse is not brought here by  
14 the Respondent, that the Bureau, if they wish to  
15 present this evidence, will have to make him available  
16 for cross examination in some form. That's solely on  
17 the basis of their rebuttal case.

18 MR. FITZGIBBON: Understood, Your Honor.

19 JUDGE CHACHKIN: All right. As far as the  
20 direct case, you say you're going to question the  
21 authenticity of documents in which he submitted,  
22 Mr. Morse submitted?

23 MR. LYON: I intend at this point to question  
24 -- if the documents are proffered for the truth of the  
25 matters asserted, I would have to question their

1 authentication if Mr. Morse is not produced because  
2 Mr. Morse apparently drafted certain of the documents,  
3 and I have no way of knowing the difference in input  
4 between him and any other signatory.

5 And, in fact, in one case, I think, he was  
6 the only signer of a document that bears his name and  
7 Chris McElwaine's.

8 JUDGE CHACHKIN: What documents are we  
9 talking about?

10 MR. LYON: I believe that that is an alleged  
11 investigative report submitted to the Field Operations  
12 Bureau on August 5th, which is buried somewhere in the  
13 Bureau's direct case.

14 JUDGE CHACHKIN: Do you know what document  
15 counsel has reference to?

16 MR. FITZGIBBON: I'm not sure which one it  
17 is. Is it the letter of August 5th?

18 MR. LYON: Yes.

19 JUDGE CHACHKIN: Whose affidavit is it  
20 attached to?

21 MR. LYON: I believe it's Chris McElwaine's.  
22 I'm looking at a September 29, 1991, letter addressed  
23 to Dear Tom. It appears to be Attachment 10 to  
24 Ms. McElwaine's testimony, and it was in the Bureau's  
25 supplement to their direct case. It appears to bear



1       only the signature of Mr. Morse. There is a  
2       typewritten line for Chris McElwaine. That would  
3       certainly be one such document that I would object to  
4       on the basis of lack of authentication.

5               MR. FITZGIBBON: I think it's Attachment 15  
6       that you're referring to, the September 29th letter.

7               MR. LYON: That's correct and, again, there  
8       may be others. I just don't have them handy, but I'll  
9       look for them. It appears to be Attachment 15. It  
10      appears twice in your exhibits.

11              JUDGE CHACHKIN: What is it?

12              MR. LYON: A letter of September 29, 1991.  
13      It appears to be Attachment 15 and Attachment 10 but,  
14      again, I think this may be premature since it's not the  
15      objection session.

16              JUDGE CHACHKIN: Attachment 15. Well, this  
17      is -- presents a very interesting problem for the  
18      Bureau, apparently. Mr. Morse, apparently, was the one  
19      who instructed Ms. McElwaine to go to the class, and  
20      she was acting pursuant to his instructions and,  
21      apparently, she coordinated her efforts with Mr. Morse.

22              So, how are you going to get into evidence of  
23      what Mr. Morse told Ms. McElwaine without Mr. Morse  
24      testifying as your witness, without running into a  
25      hearsay problem?

1                   It seems to me he is a key witness for the  
2 Bureau, is he not, Mr. Morse?

3                   MR. FITZGIBBON: We hadn't considered him a  
4 key witness.

5                   JUDGE CHACHKIN: Well, he's the one,  
6 apparently, who coordinated this whole thing. Wasn't  
7 he the one who instructed her or gave her instructions  
8 what to do?

9                   MR. FITZGIBBON: That's correct, Your Honor.  
10 He did give her instructions on what to do, but he  
11 doesn't have any first-hand knowledge of what occurred  
12 at the classes and test sessions that she attended.

13                  MR. LYON: Yet the Bureau, Your Honor, is  
14 tendering documents bearing his signature reporting on  
15 just that fact.

16                  JUDGE CHACHKIN: And then he's also here,  
17 apparently -- he's written a letter to the Bureau,  
18 Mr. Fitzgibbon, which the Bureau intends to introduce,  
19 I assume, for the truth of the matter.

20                  MR. FITZGIBBON: Which attachment is this?

21                  JUDGE CHACHKIN: That's Attachment 15.

22                  MR. FITZGIBBON: But, this is from both David  
23 Morse and Christine McElwaine.

24                  JUDGE CHACHKIN: I understand that.

25                  MR. FITZGIBBON: If the letter is authored by

1 two people, either one could authenticate it.

2 MR. LYON: It's only signed by Mr. Morse,  
3 Your Honor.

4 JUDGE CHACHKIN: That's true; it is only  
5 signed by Mr. Morse.

6 MR. MALINEN: Your Honor, at a minimum, it  
7 would seem, on the hearsay side, we could offer  
8 Christine McElwaine's assertion on the stand that she  
9 had spoken with Mr. Morse and so on.

10 JUDGE CHACHKIN: She couldn't testify what  
11 Mr. Morse told her.

12 MR. MALINEN: Not his words.

13 JUDGE CHACHKIN: That's correct. Now, how  
14 are you going to get in what instructions she was given  
15 and reports she made to him unless you put him on the  
16 stand as well?

17 MR. MALINEN: It would seem we could get in  
18 the results. Maybe not the instructions going in, but  
19 simply the results that she gave going out.

20 JUDGE CHACHKIN: Well, you may be limited to  
21 just that.

22 MR. MALINEN: Yes.

23 JUDGE CHACHKIN: It would seem to me  
24 Mr. Morse appears to be a key player and should testify  
25 since he seems to have coordinated all those efforts

1 with Ms. McElwaine and dealt with her and told her what  
2 to do and, apparently, she was in contact with him  
3 after she had done what she did.

4 MR. LYON: He also was a contact, apparently,  
5 or a major contact between Mr. Fitzgibbon, the Field  
6 Operations Bureau, Mr. Maia, and he also received the  
7 initial complaint for Mr. Fare, who was another fired  
8 instructor from the school, and apparently somehow  
9 involved Mr. Ordway, who I previously mentioned was a  
10 fired instructor, in the investigation. I think he is  
11 a key witness, Your Honor.

12 JUDGE CHACHKIN: I think for a complete  
13 record, we would need to have the testimony of  
14 Mr. Morse. Of course, the Bureau hasn't presented any  
15 affidavit of Mr. Morse, a declaration of Mr. Morse.

16 So, the question is, do you have any  
17 objection to Mr. Morse appearing orally and testifying  
18 orally as part of the Bureau's direct case?

19 MR. LYON: Not a bit. I'd love to have him  
20 here.

21 MR. FITZGIBBON: We're not prepared to decide  
22 at this time whether to call Mr. Morse. We would have  
23 to consider that, and we weren't really prepared to  
24 discuss this hearsay question.

25 JUDGE CHACHKIN: Well, it's going to come up.

1                   MR. FITZGIBBON: But what -- the instructions  
2                   Mr. Morse gave to Ms. McElwaine, I don't think what  
3                   Ms. McElwaine says he told her would be -- it wouldn't  
4                   be put into the record for the truth of the  
5                   instructions but for the fact that he did give her  
6                   those instructions. So, I don't think it's really  
7                   hearsay.

8                   MR. MALINEN: Your Honor, I might add, again,  
9                   this document is from Christine McElwaine. Presumably,  
10                  she could discuss all the matters in it, including what  
11                  transpired at the sessions, and omit the precise  
12                  instructions, the statements from Mr. Morse, and that  
13                  is how we perceive the case.

14                  We might not have thought this document  
15                  through as sufficiently as we can, but it appears to me  
16                  now that what we're discussing is bringing out  
17                  Mr. Morse, at least to the extent that the Bureau  
18                  brings him out, we're discussing bringing him out  
19                  simply for the purpose of his giving a couple of  
20                  sentences with regard to precisely what he told  
21                  Christine McElwaine when, in fact, later she can  
22                  indicate the fact under the hearsay rules that she was  
23                  instructed and then indicate what she found out.

24                  And it is the results that we are running  
25                  with and not the conspiracy type of theory that --

1 JUDGE CHACHKIN: Couldn't she coordinate  
2 these results from Mr. Morse? Didn't she discuss with  
3 Mr. Morse after the fact, after she --

4 MR. MALINEN: It is true that Mr. Morse is,  
5 in the view of the Respondents, an important player in  
6 this drama. He simply is not our player in this  
7 fashion.

8 JUDGE CHACHKIN: Well, I'm just wondering,  
9 how is the Bureau going to prove that -- isn't it  
10 necessary, as a connecting witness, that the Bureau  
11 present Mr. Morse, since he was the one who instructed  
12 her, who is your key witness, and his instructions and  
13 their coordination afterwards and what other steps  
14 Mr. Morse took? Isn't this all interconnected?

15 MR. FITZGIBBON: Yes, it is interconnected,  
16 but we're not really prepared at this time to commit to  
17 calling him as a witness.

18 MR. LYON: Your Honor, I would also point out  
19 that it was Mr. Morse who supposedly received the  
20 complaint. It was Mr. Morse who he says got authority  
21 "through channels" to investigate this matter. It was  
22 Mr. Morse who coordinated with Mr. Fitzgibbon and  
23 supposedly with the Field Operations Bureau. It was  
24 Mr. Morse who had possession of the tape recording of  
25 the September 14th, 1991 session and who made the

1 recording off of which the Bureau has tendered a  
2 transcript.

3 I mean, if for no other reason, Mr. Morse has  
4 to be produced to authenticate the chain of custody  
5 with respect to the tape.

6 JUDGE CHACHKIN: There are going to be  
7 problems if you don't produce Mr. Morse if you want to  
8 present the tape and all these other things which he  
9 was involved in.

10 It seems to me, based on what I hear, that  
11 Mr. Morse would appear to be an essential witness of  
12 the Bureau to show exactly what this transaction was;  
13 what happened; how Ms. McElwaine got involved in this  
14 thing and why she was chosen and what, what was  
15 involved here.

16 MR. LYON: Not to mention what training, if  
17 any, she had before she was sent in here.

18 JUDGE CHACHKIN: Well, I think those are  
19 factors to be considered, may be factors to be  
20 considered. I don't know at this time. I don't see  
21 how you could not present Mr. Morse, frankly.

22 MR. MALINEN: We could, Your Honor, perhaps  
23 discuss at this time a speakerphone option here. We're  
24 ten days before the hearing and, if you view this as an  
25 infirmity in the case, we must have Mr. Morse, perhaps

1           that would solve matters.

2                   MR. LYON: I won't agree, Your Honor. I have  
3 a right under the rules. I must consent to the use of  
4 a speakerphone, and I absolutely will not consent to  
5 Mr. Morse unless you can judge his credibility. I  
6 think his credibility is key here, and I think you need  
7 to see him. You need to see his reaction when I  
8 confront him.

9                   JUDGE CHACHKIN: Well, it appears to me that  
10 Mr. Morse should be brought. He is a key witness, and  
11 he should testify, and he should testify in person.

12                  MR. MALINEN: Your Honor, we might have  
13 constraints ourselves in bringing out certain numbers  
14 of witnesses. If the less controversial witnesses can  
15 perhaps be examined by speakerphone, we can try to make  
16 arrangements now and have Mr. Morse flown in, and we  
17 appreciate your concern over this matter.

18                  JUDGE CHACHKIN: We had Ms. McElwaine you  
19 were going to present orally.

20                  MR. MALINEN: Yes, Your Honor.

21                  JUDGE CHACHKIN: Mr. Johnston you were going  
22 to present orally.

23                  MR. MALINEN: He's local, yes.

24                  JUDGE CHACHKIN: He's local. But now we have  
25 Mr. Maia, and I said you didn't have to present him



1 unless you want to put in your rebuttal.

2 MR. MALINEN: Yes, sir.

3 JUDGE CHACHKIN: As far as Mr. Georgias is  
4 concerned, where is he? Do I understand that you want  
5 him just because of rebuttal?

6 MR. LYON: Well, Your Honor, initially, his  
7 rebuttal doesn't differ materially from his direct case  
8 except there's an entirely new slant on it which tends  
9 to implicate the credibility of Mr. Pascal and, quite  
10 frankly, it also contradicts certain things that  
11 Mr. Georgias told me in a telephone conversation.

12 So, while I did not initially ask for  
13 Mr. Georgias on direct, given his rebuttal exhibit, I  
14 must reconsider that.

15 JUDGE CHACHKIN: What is his rebuttal  
16 exhibit?

17 MR. MALINEN: Your Honor, if I may,  
18 Mr. Georgias' testimony, at least the contentious  
19 portion, would appear to be a single telephone call and  
20 a statement which we allege was made by Mr. Pascal to  
21 Mr. Georgias.

22 MR. LYON: The controversy with respect to  
23 Mr. Georgias' testimony involves whether Mr. Pascal  
24 asked for sample tests or the test that would be given.  
25 Given that the tests that are given by Devreys come off

1 of a computer disk, I don't know how he could have ever  
2 gotten "the test."

3 Mr. Pascal's testimony would be that he  
4 called Mr. Georgias and asked for sample tests, so that  
5 he could prepare his students. Mr. Georgias apparently  
6 didn't understand the word sample or doesn't believe  
7 that he was asked for sample tests, and that's the  
8 nature of the controversy.

9 I would also point out, Your Honor, that I  
10 intend to object to Mr. Georgias' testimony in its  
11 entirety because it's a collateral matter. The Bureau  
12 has put into issue only the test sessions that happened  
13 on August 4, August 24 and September 14th.

14 There's no mention of anything having to do  
15 with Mr. Georgias in the Order to Show Cause, and this  
16 telephone conversation occurred in October of '91. I  
17 mean, essentially, the Bureau is attempting to raise  
18 some sort of other bad ax type of argument, and I think  
19 the case law is very clear that that type of evidence  
20 is not admissible because its prejudicial value far  
21 outweighs its probative value.

22 I would refer Your Honor with respect to that  
23 to McCormick on Evidence in the chapters dealing with  
24 character and habit. I didn't intend to make my pitch  
25 on why Mr. Georgias' testimony should not be received

1 but, since it appears relevant at this point, I feel I  
2 ought to bring up that objection because it may moot  
3 the necessity for the Bureau to bring Mr. Georgias to  
4 Washington.

5 JUDGE CHACHKIN: Well, doesn't the  
6 Designation Order deal strictly with certain dates?  
7 What is the relevance --

8 MR. MALINEN: As an initial matter, yes, Your  
9 Honor. Of course, we don't, in the Order to Show  
10 Cause, have to indicate precisely which witnesses we're  
11 going to have to bring up four months hence.

12 JUDGE CHACHKIN: I understand that, but how  
13 is his testimony relevant to the issues that have been  
14 designated in this case? This is a revocation  
15 proceeding, and it deals with certain events and,  
16 according to Mr. Lyon, this has nothing to do with any  
17 of these events listed in the Designation Order, the  
18 issues listed in the Designation Order.

19 MR. FITZGIBBON: Well, if Mr. Georgias'  
20 testimony is true, it shows that Mr. Pascal has an  
21 inclination to request access to examinations before  
22 teaching a class, so he can, in effect, teach the exam  
23 to the students.

24 JUDGE CHACHKIN: What does that have to do  
25 with what he did in connection with these exams? I

1 mean, do you have any evidence that he, in fact, asked  
2 for samples of the exam prior to the time of the issues  
3 in question here? I mean, are you bringing up a moot  
4 issue? He's not being charged with this issue.

5 MR. FITZGIBBON: No. This happened  
6 afterwards. This is connected with the events.

7 JUDGE CHACKIN: How is it connected with the  
8 events?

9 MR. FITZGIBBON: Because the -- Mr. Pascal  
10 called Mr. Devreys in order to arrange for volunteer  
11 examiners to re-test the students who had been tested  
12 at the sessions that are involved in this case. The  
13 results of those sessions were invalidated by the W5YI  
14 VEC, and Mr. Pascal needed volunteer examiners to  
15 readminister tests to the students. So, he called  
16 Mr. Georgias.

17 MR. LYON: Your Honor, Mr. Fitzgibbon has  
18 confirmed what I thought the point of offering this  
19 testimony to be, which was to show "other bad ax," and  
20 it's an elementary principle of evidence law that  
21 that's not admissible to try to prove that someone did  
22 or did not, on another occasion, do something that's an  
23 issue of the case.

24 Again, I would refer you to the chapter on  
25 character and habit in McCormick on Evidence. In

1 negligence cases, for example, it says that most Courts  
2 will reject proof of the actor's reputation for care  
3 and negligence or opinion testimony from observation of  
4 its character in this respect.

5 Basically, to analogize this to the criminal  
6 case, you can't bring in a woman's prior sexual history  
7 to prove she did or did not consent to a specific act  
8 of intercourse in a rape trial. I mean, that type of  
9 thing is prejudicial, and it doesn't really bear on the  
10 issue. It also opens up innumerable collateral type  
11 matters that you never get the trial over with.

12 JUDGE CHACHKIN: Well, I would be less  
13 concerned that this was prior to the acts in question  
14 rather than subsequent to the acts in question.

15 MR. LYON: I think that's a good point, Your  
16 Honor.

17 MR. MALINEN: Although we have not briefed  
18 disability issues because they are to be discussed, we  
19 understand, next week and, despite Mr. Lyon's  
20 disclaimer not to have done so, having evidence at text  
21 at hand, he appears to have done so, I would say that  
22 this phone call followed the very exams in question  
23 here.

24 The exams in question here were invalidated;  
25 that is, the students who took those exams lost their

1 status that they might have otherwise obtained from  
2 those examinations, and they had to re-test.

3 Furthermore, the VE's there had to be  
4 changed, the people who were, in fact, doing the  
5 testing. This phone call followed those examinations  
6 in a request to get people, volunteer examiners to give  
7 follow-up exams.

8 Our theory here is that Mr. Pascal knew the  
9 contents of tests. He trained students on the basis of  
10 that to a certain extent, and this conduct is entirely  
11 consistent, what the telephone conversation evidences  
12 is conduct entirely consistent with our theory.

13 MR. LYON: Your Honor, that might be their  
14 theory, but they have presented absolutely no evidence  
15 to show that Mr. Pascal solicited the VE's or the VEC's  
16 in the August 4, August 24 and September 14  
17 examinations to show that he solicited them to provide  
18 the test and, in fact, the VE's, Mr. Fakehany and  
19 Mr. Pierce, who were contact VE's for those sessions,  
20 have said that they have the tests in their possession,  
21 and that Mr. Pascal didn't know.

22 I understand why the Bureau is reaching down  
23 to Mr. Georgias to try to prove this because they don't  
24 have anything with respect to those sessions, but I  
25 don't think it makes it appropriate, Your Honor.

1 JUDGE CHACHKIN: Do you have any evidence  
2 that he obtained the tests prior to the time he  
3 administered the tests which are the subject of the  
4 Designation Order?

5 MR. FITZGIBBON: Well, the evidence we have  
6 is simply that it can be inferred from what took place  
7 at the classes and the test sessions afterwards.

8 MR. LYON: Your Honor, I don't know what that  
9 means. I think what it means is that they had Chris  
10 McElwaine go through and circle what she thinks was  
11 covered during the class and what was on the exam, and  
12 I'm going to suggest to you next week that that's not a  
13 very probative way to prove this point either.

14 JUDGE CHACHKIN: You have no evidence of any  
15 similar occurrence as you allege, as Mr. Georgias  
16 alleges, which occurred prior to the tests involved  
17 here; is that correct?

18 MR. FITZGIBBON: That's correct, Your Honor.

19 JUDGE CHACHKIN: Well, I don't see how you  
20 can use this telephone conversation which occurred long  
21 after the tests in question as a basis to support your  
22 theory that he had the tests in question prior to these  
23 tests.

24 I find difficulty how you're going to allege  
25 on the basis of the fact he had this telephone

1 conversation after the fact, how that proves  
2 therefore -- or as any evidence which helps to  
3 establish that he, in fact, had the tests prior to the  
4 examinations which are discussed in the issues here.

5 MR. MALINEN: Well, we are arguing, Your  
6 Honor, that this telephone conversation did occur  
7 relatively soon after the exams. In direct response to  
8 the invalidation of those exams in an effort -- if the  
9 conversation is to be believed, in an effort to get the  
10 tests, to do again -- to train again, as we are  
11 attempting to prove in our case-in-chief; that is, from  
12 examinations.

13 JUDGE CHACHKIN: But you haven't charged him  
14 with that in your Designation Order as doing anything  
15 wrong in the case with this telephone conversation?  
16 It's not one of the issues here?

17 MR. MALINEN: No. It's simply going to  
18 character and a method of operating consistent with --

19 JUDGE CHACHKIN: I could understand how  
20 evidence of this nature might be relevant if you had  
21 some evidence to establish that, in fact, he had  
22 secured these tests prior to the time he administered  
23 these tests on other occasions, to show that this was a  
24 pattern of conduct, but on the basis of this alleged  
25 telephone call, I don't see how that establishes a



1 pattern of conduct.

2 MR. MALINEN: Our case-in-chief does, in  
3 fact, rely on circumstantial and other evidence that  
4 seems to indicate that Mr. Pascal had the exact test in  
5 hand when he did his training session.

6 JUDGE CHACHKIN: Whatever you have, if you  
7 have such evidence, you can introduce such evidence,  
8 but I don't see how this conversation after the fact  
9 helps establish that he did it prior to the time he  
10 administered the tests in question.

11 MR. MALINEN: It's true, not other than  
12 simply a method of conduct, attempting to obtain tests  
13 prior to training, that is consistent with our theory.

14 MR. LYON: It's consistent with their theory,  
15 but it's not consistent with the evidence that they've  
16 introduced, Your Honor.

17 JUDGE CHACHKIN: You don't have any evidence  
18 in which he made any solicitations of this nature prior  
19 to administering these tests. So, there's no pattern  
20 of conduct here. You're trying to infer from what took  
21 place that he must have solicited these tests, but you  
22 have no evidence from any other VEC operators, whoever  
23 these individuals are, that he, in fact, did ask them  
24 for any tests prior to that time.

25 Where is that evidence? If he, in fact, did